



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
LUFKIN DIVISION

UNITED STATES OF AMERICA

VS.

LARRY WAYNE BOGAN

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CASE NO. 9:08-CR-29

**FINDINGS OF FACT AND RECOMMENDATION ON GUILTY PLEA**  
**BEFORE THE UNITED STATES MAGISTRATE JUDGE**

The District Court referred this matter to the undersigned United States Magistrate Judge for administration of a guilty plea and allocution under Rules 11 and 32 of the Federal Rules of Criminal Procedure. Magistrate judges have the statutory authority to conduct a felony guilty plea proceeding as an “additional duty” pursuant to 28 U.S.C. § 636(b)(3). *United States v. Bolivar-Munoz*, 313 F.3d 253, 255 (5<sup>th</sup> Cir. 2002), *cert. denied*, 123 S. Ct. 1642 (2003).

On August 13, 2009, this cause came before the undersigned United States Magistrate Judge for entry of a guilty plea by the Defendant, on **Count III** of the charging **Indictment** filed in this cause. Count III of the Indictment charges that on or about May 22, 2008, in the Eastern District of Texas, Larry Wayne Bogan, Defendant herein, having been convicted of crimes

punishable by imprisonment for a term exceeding one year<sup>1</sup>, did knowingly and unlawfully possess in and affecting commerce a firearm, to wit: a Clerke, Model Clerke 1<sup>st</sup>, .32 caliber revolver, bearing serial number 806248, all in violation of Title 18, United States Code, Section 922(g)(1).

Defendant, Larry Wayne Bogan, entered a plea of guilty to Count III of the Indictment into the record at the hearing.

After conducting the proceeding in the form and manner prescribed by Federal Rule of Criminal Procedure 11 the Court finds:

a. That Defendant, after consultation with counsel of record, has knowingly, freely and voluntarily consented to the administration of the guilty plea in this cause by a United States Magistrate Judge in the Eastern District of Texas subject to a final approval and imposition of sentence by the District Court.

b. That Defendant and the Government have entered into a plea agreement which was disclosed and addressed in open court, entered into the record, and placed under seal.

c. That Defendant is fully competent and capable of entering an informed plea, that Defendant is aware of the nature of the charges and the consequences of the plea, and that the plea of guilty is a knowing, voluntary and freely made plea. Upon addressing the Defendant personally in open court, the Court determines that Defendant's plea is voluntary and did not result from force, threats or promises. *See* FED. R. CRIM. P. 11(b)(2).

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<sup>1</sup>The Indictment lists several specific prior felonies as part of the felon in possession charge, and the *Factual Resume* also describes those prior felonies. For the sake of brevity the Court will not restate those felonies but refers to the Indictment and the *Factual Resume* stated herein.

d. That Defendant's knowing, voluntary and freely made plea is supported by an independent factual basis establishing each of the essential elements of the offense and Defendant realizes that his conduct falls within the definition of the crime charged under 18 U.S.C. § 922(g)(1).

### **STATEMENT OF REASONS**

As factual support for Defendant's guilty plea, the Government presented the following evidence, which was admitted into the record at the plea hearing. *See Factual Resume.* The Government and the Defendant agreed that if this case were to proceed to trial, the Government would prove that Defendant is one and the same person charged in the Indictment and that the events described in Indictment occurred in the Eastern District of Texas. The Government would also prove each essential element of the charged offense beyond a reasonable doubt through the testimony of witnesses, including expert witnesses, and through admissible exhibits.

Specifically, the Government would prove that on May 22, 2008, officers with the Lufkin Police Department executed a narcotics search warrant at Petty's Motel, room #139, located on Timberland Drive in Lufkin, Texas, in the Eastern District of Texas. The motel room was rented in the name of the Defendant. When officers arrived at the motel room, they encountered the Defendant, Kevin Frazier, and Douglas Myers. Officers searched the hotel room and recovered crack cocaine and a Clerke, Model Clerke 1<sup>st</sup>, .32 caliber revolver, bearing serial number 806248 in a dresser drawer. Officers also located a North American Arms, Model 22LR, .22 caliber revolver, bearing serial number L042800 in a camera bag on top of the dresser.

The Defendant has the following felony convictions:

- 1) Possession of a Controlled Substance - Cocaine, a felony, in Cause Number 20,822, in the 217<sup>th</sup> Judicial District Court, Angelina County, Texas on August 13, 1999;
- 2) Credit Card Abuse, a felony, in Cause Number 25,516, in the 217<sup>th</sup> Judicial District Court, Angelina County, Texas on November 1, 2005; and
- 3) Forgery by Passing, a felony, in Cause Number 18,045, in the 217<sup>th</sup> Judicial District Court, Angelina County, Texas on January 23, 1995.

Special Agent John Russell Morrison with the Bureau of Alcohol, Tobacco, Firearms, and Explosives is an expert in the area of interstate commerce as it relates to the manufacturing of firearms and ammunition and determined that both firearms found in the Defendant's possession were not manufactured in Texas and, therefore, traveled in interstate commerce.

Defendant, Larry Wayne Bogan, agreed with the facts set forth by the Government and signed the *Factual Resume*. Counsel for Defendant and the Government attested to Defendant's competency and capability to enter an informed plea of guilty. The Defendant agreed with the evidence presented by the Government and personally testified that he was entering his guilty plea knowingly, freely and voluntarily.

#### **RECOMMENDED DISPOSITION**

**IT IS THEREFORE** the recommendation of the undersigned United States Magistrate Judge that the District Court accept the Guilty Plea of Defendant which the undersigned determines to be supported by an independent factual basis establishing each of the essential elements of the offense charged in **Count III** of the charging **Indictment** on file in this criminal proceeding. The Court also recommends that the District Court conditionally accept the plea

agreement.<sup>2</sup> Accordingly, it is further recommended that, Defendant, Larry Wayne Bogan, be finally adjudged as guilty of the charged offense under Title 18, United States Code, Section 922(g)(1).

Defendant is ordered to report to the United States Probation Department for the preparation of a presentence report. At the plea hearing, the Court admonished the Defendant that the District Court may reject his plea and that the District Court can decline to sentence Defendant in accordance with the plea agreement, the federal sentencing guidelines and/or the presentence report because the sentencing guidelines are advisory in nature. The District Court may defer its decision to accept or reject the plea agreement until there has been an opportunity to consider the presentence report. *See* FED. R. CRIM. P. 11(c)(3). If the Court rejects the plea agreement, the Court will advise Defendant in open court that it is not bound by the plea agreement and Defendant may have the opportunity to withdraw his guilty plea, dependent upon the type of the plea agreement. *See* FED. R. CRIM. P. 11(c)(3)(B). If the plea agreement is rejected and Defendant still persists in the guilty plea, the disposition of the case may be less

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<sup>2</sup>“(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.” FED. CRIM. P. 11(c)(3)-(5).

favorable to Defendant than that contemplated by the plea agreement. Defendant has the right to allocute before the District Court before imposition of sentence.

### **OBJECTIONS**

Within ten (10) days after receipt of this report, any party may serve and file written objections to the report and recommendation of the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(C). Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within ten (10) days after service shall bar an aggrieved party from *de novo* review by the District Judge of the proposed findings, conclusions and recommendations, and from appellate review of factual findings and legal conclusions accepted by the District Court except on grounds of plain error. *Douglass v. United Serv. Auto. Ass'n.*, 79 F.3d 1415 (5<sup>th</sup> Cir. 1996) (*en banc*); 28 U.S.C. § 636(b)(1). The constitutional safeguards afforded by Congress and the courts require that, when a party takes advantage of his right to object to a magistrate's findings or recommendation, a district judge must exercise its nondelegable authority by considering the actual evidence and not merely by reviewing and blindly adopting the magistrate's report and recommendation. *See Hernandez v. Estelle*, 711 F.2d 619, 620 (5<sup>th</sup> Cir. 1983); *United States v. Elsoffer*, 644 F.2d 357, 359 (5<sup>th</sup> Cir. 1981) (*per curiam*).

**SIGNED this the 14th day of August, 2009.**

  
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KEITH F. GIBLIN  
UNITED STATES MAGISTRATE JUDGE